DIGITAL TECHNOLOGIES AND LABOUR RELATIONS: LEGAL REGULATION IN RUSSIA AND CHINA

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The widespread use of digital technologies in the field of labour relations raises the issue of examining the readiness and capability of the legislation in Russia and China to adequately regulate labour in modern workplace conditions while respecting the balance of interests and the rights of employees, employers and the state. This article draws a number of conclusions, one of which is that currently in the Russian Federation, the legal regulation of the use of digital technologies in the field of labour is haphazard, contradictory and not designed for the long term. Despite a number of significant scientific studies conducted in this area and the serious commitment of the People's Republic of China to the issues of informatization, the legal regulation of the digitalization of labour relations lags behind technological progress. A number of issues in urgent need of legal regulation remain outside the legal field (robotization and algorithmization in the field of labour; protection of personal data of job applicants; the problem of unemployment in the application of artificial intelligence in the labour process). It appears that today there is an urgent need for the federal authorities of the Russian Federation to adopt a strategy for the transformation of labour relations in the application of digital (information) technologies as well as a need to develop a concept of robotization and algorithmization of the labour process. Furthermore, when creating these documents and adjusting the current regulatory framework, the Russian legislator should take into account the experience of international and foreign regulation of labour relations in the field of digitalization of labour relations.

Keywords: labour relations; digital technologies; control over employees; employees of Internet platforms; remote workers; private life of employees.

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Table of Contents

Introduction

Modern society today faces a difficult task: it needs to adapt to the almost universal introduction of digital technologies in the many spheres of daily life. This also applies to the field of labour relations. However,

> due to fundamental reasons, the law does not have the necessary flexibility for the rapid introduction of digital technologies into its sphere, which allows us to talk about such a feature of the influence of digital technologies in this branch of law as the heterogeneity of the pace of bifurcation of legal norms.[1]

We can say that today we are witnessing the proliferation of artificial intelligence in various spheres of public life.[2]

Of course, scientific and technological progress, robotization and automation are transforming the workplace. These changes are far-reaching and multifaceted. The introduction of new (digital) technologies, the algorithmization of processes, the use of big data and automated decision-making using artificial intelligence can have a significant impact on people's lives, especially on those who are already working and are already immersed in a situation where the distribution of legal and economic power is prone to disruptions or the specified power is unstable.[3]

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[1] Механизмы и модели регулирования цифровых технологий: монография / под общ. ред. А.В. Минбалеева [Aleksey V. Minbaleev (ed.), *Digital Regulatory Mechanisms and Models: A Monograph*] 26 (2020).

[2] Anton Korinek, *Labor in the Age of Automation and Artificial Intelligence*, Economists for Inclusive Prosperity (January 2019) (Nov. 10, 2022) (Nov. 10, 2022), available at https://econfip.org/wp-content/uploads/2019/02/6.Labor-in-the-Age-of-Automation-and-Artificial-Intelligence.pdf.

[3] The report of the International Labour Organization "The Future of Work We Want: A Global Dialogue" on 6–7 April 2017 (Nov. 10, 2022), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_570282.pdf.

At the same time, in Russia as in China, the development of digital technologies lags behind their legal regulation.[4]

In fact, since the beginning of the 21st century, we are faced with the emergence of a gap in time between the emergence of new technologies, the possibility of their use in everyday life and the availability of appropriate legal regulation.[5]

1. Theoretical and Regulatory Framework for Introducing Digital Technologies in Labour Relations

The conceptual apparatus in the field of digitalization of relations is in its early stages of development.

By information technologies, the Federal Law "On Information, Information Technologies and Information Protection"[6] refers to processes, methods of searching, collecting, storing, processing, providing and distributing information, as well as ways of implementing such processes and methods into practice (Art. 2).

Algorithms using artificial intelligence or machine learning have achieved superhuman characteristics in a wide range of economically valuable tasks.[7]

Automation should be aimed not only at replacing manual labour with mechanical labour, but also at a qualitative change in the structure of production and a significant increase in labour productivity. Otherwise, there will be no demand for labour in the other fields, which will certainly affect the social standing of the person who performs the labour.[8] In essence, artificial intelligence should contribute to the restructuring of production.[9]

The Russian Federation has adopted a number of strategic (programmatic) documents on the legal regulation of the use of digital technologies.

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[4] *Трощинский П.В., Молотников А.Е.* Особенности нормативно-правового регулирования цифровой экономики и цифровых технологий в Китае // Правоведение. 2019. № 63(2). С. 310 [Pavel V. Troshchinskiy & Alexander E. Molotnikov, *Features of Legal Regulation of the Digital Economy and Digital Technologies in China*, 63(2) Pravovedenie 309, 310 (2019)].

[5] Minbaleev (ed.) 2020, at 45.

[6] Федеральный закон от 27 июля 2006 г. № 149-ФЗ «Об информации, информационных технологиях и о защите информации» // Российская газета. 2006. 29 июля. № 165 [Federal Law No. 149-FZ of 27 July 2006. On Information, Information Technologies and Information Protection, Rossiyskaya Gazeta, 29 July 2006, No. 165].

[7] Mechael Webb, *The Impact of Artificial Intelligence on the Labor Market*, SSRN Electronic J. (2020) (Nov. 10, 2022), available at https://ssrn.com/abstract=3482150.

[8] *Daron Acemoglu & Pascual Restrepo,* The Wrong Kind of AI? Artificial Intelligence and the Future of Labor Demand*, w25682 NBER Working Paper (2019) (Nov. 10, 2022), available at https://ssrn.com/abstract=3359482.*

[9] Eric Brynjolfsson et al., *What Can Machines Learn and What Does it Mean for Occupations and the Economy?*, 108 Am. Econ. Ass'n Papers & Proc. 43–47 (2018).

The strategy for the development of the information society in the Russian Federation for 2017–2030[10] states that one of the main tasks of using information and communication technologies for the development of the social sphere is to stimulate Russian organizations in order to provide employees with opportunities for remote employment and the creation of information and communication technology-based management and monitoring systems in all spheres of public life. In the sphere of interaction between the state and business, the following main tasks are established in relation to the labour sphere: the promotion of electronic document management and the implementation in electronic form of the identification and authentication of participants in legal relations.

It is important to note that when formulating and ensuring these strategies of national interest, there is no mention of ensuring the protection of the rights of employees and employers (businesses) from the impact of digital (information) technologies on labour relations.

Of particular interest to this study is the "National Action Plan for the Restoration of Employment and Incomes of the Population, Economic Growth and Long-Term Structural Changes in the Economy" of 23 September 2020.[11] The labour market in the digital era is characterized by the regulatory and legal support for remote work, including a combination of remote work and on-site work, improved regulations for part-time employment and self-employment, and the introduction of electronic personnel document management.

In addition to the above, it is planned, in particular, to introduce a single digital platform for education, advanced training and employment support in order to increase labour productivity and labour market flexibility based on integrating interaction with educational institutions, employment centers, employers, citizens and other labour market participants.

As part of the implementation of the national program "Digital Economy of the Russian Federation," the federal project "Regulatory Regulation of the Digital Environment" was adopted,[12] according to which it is planned to implement a number of

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[10] Указ Президента Российской Федерации от 9 мая 2017 г. № 203 «О стратегии развития информационного общества в Российской Федерации на 2017–2030 годы» // Собрание законодательства Российской Федерации. 2017. № 20. Ст. 2901 [Presidential Decree No. 203 of 9 May 2017. On the Strategy for the Development of Information Society in the Russian Federation for 2017–2030, Legislation Bulletin of the Russian Federation, 2008, No. 20, Art. 2901].

[11] «Общенациональный план действий, обеспечивающих восстановление занятости и доходов населения, рост экономики и долгосрочные структурные изменения в экономике», одобрен Правительством Российской Федерации 23 сентября 2020 г., протокол № 36, раздел VII [A Nationwide Action Plan for Employment and Income Recovery, Economic Growth and Long-Term Structural Change in the Economy, approved by the Government of the Russian Federation, Minutes No. 36 of 23 September 2020, Section VII] (Nov. 10, 2022), available at https://pravdaosro.ru/.

[12] Паспорт национального проекта «Национальная программа «Цифровая экономика Российской Федерации» (утв. президиумом Совета при Президенте Российской Федерации по стратегическому развитию и национальным проектам, протокол от 4 июня 2019 г. № 7) // СПС «Консуль-

measures through the adoption of federal laws. These measures relate to electronic document management, personal data protection and the creation of a platform for interaction in labour relations. Much of what has been said has already been done.

It should be noted that despite the very high level of digitalization in the People's Republic of China, the legal regulation of this phenomenon has remained insignificant and cautious for a long time.[13]

China's legislation in the field of regulation of digital and information technologies is focused on the following main vectors: ensuring the security of users and the state in cyberspace, as well as in the information technology industry; centralized regulation of the digitalization of public administration; building global digital platforms and developing online systems in the fields of economics, finance, labour market, justice and others.

In China, as in Russia, a number of policy documents have been adopted in the field of the development of information and digital technologies.[14]

In 2016, the "National Strategy for Informatization and Development" was adopted in order to implement the information policy of the People's Republic of China. According to this strategy as well as a number of other documents, China should become a leading country in advanced technologies and software by the year 2025. Furthermore, the country aims to take the lead in the production of high-tech products and the creation of software by the middle of the twenty-first century. These concepts are based on previously adopted strategic initiatives such as "Internet Plus" and "Made in China – 2025."[15]

An important direction in the development of digital innovation is the creation of global online platforms.[16] At the same time, the legal regulation of their activities has certain specifics in China. If in other countries this kind of regulation is largely

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тантПлюс» [Passport of the National Project, National Programme "Digital Economy of the Russian Federation" (approved by the Presidium of the Presidential Council for Strategic Development and National Projects, Minutes No. 7 of 6 July 2019), SPS "ConsultantPlus"] (Nov. 10, 2022), available at http://www.consultant.ru/online/.

13 Troshchinskiy & Molotnikov 2019, at 317.

14 *Томайчук Л.В.* Цифровизация экономики Китая: риски и возможности для общества // Евразийская интеграция: экономика, право, политика. 2019. № 3(29). С. 33 [Lilia V. Tomaichuk, *Digitalization of China's Economy: Risks and Opportunities for Society*, 3(29) Eurasian Integration: Econ., L., Pol. 31, 33 (2019)].

15 *Понька Т.И., Рамич М.С., Юйяо У.* Информационная политика и информационная безопасность КНР: развитие, подходы и реализация // Вестник Российского университета дружбы народов. Серия: Международные отношения. 2020. № 20(2). С. 385. [Tatyana I. Ponka et al., *Information Policy and Information Security of PRC: Development, Approaches and Implementation*, 20(2) Vestnik RUDN, Int'l Rel. 382, 385 (2020)].

16 Dun Li et al., *How Do Platforms Improve Social Capital within Sharing Economy-Based Service Triads: An Information Processing Perspective*, Production Plan. & Control (2022) (Nov. 10, 2022), available at https://doi.org/10.1080/09537287.2022.2101959.

built along the path of compliance with antimonopoly legislation, then in China, from this point of view, global online platforms have relative freedom as well as some kind of protection from antimonopoly interference.[17]

It should be noted that in China, as in Russia, much attention is paid to the creation of state-regulated online platforms, both in the field of economics and public administration, such as the online justice platform.[18]

It should also be noted that in recent years, a great deal of effort has been expended in Russia to create online platforms related to providing citizens and entrepreneurs with a wide range of services. After conducting an experiment on the adoption of technologies for electronic (paperless) registration of labour relations[19] in 2021, amendments and additions were made to the Labour Code of the Russian Federation,[20] legalizing these rules.[21]

At the same time, the logic underlying the development of Russian legislation in this area points to the nationalization of electronic personnel document management, since the most effective way of facilitating remote interaction between an employee and an employer is a single digital platform in the field of employment and labour relations known as "Work in Russia." As a result, the state has the ability to control the details of employment contracts and influence the way labour relations are registered.

There is no such platform in China yet, but the idea is being considered.[22] This will be further discussed in more detail.

It appears that these legislative decisions will not have an entirely positive impact on the effective regulation of labour relations, since the issues relating to regulating the interaction between an employee and an employer remain outside the scope of legal regulation. It is the mechanism of exercising labour rights and fulfilling labour

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17 Yang Cao, *Regulating Digital Platforms in China: Current Practice and Future Developments*, 11(3–4) J. Eur. Comp. L. Pract. 173 (2020).

18 Yulia Kharitonova & Larisa Sannikova, *Digital Platforms in China and Europe: Legal Challenges*, 8(3) BRICS L.J. 133 (2021).

19 Федеральный закон от 24 апреля 2020 г. № 122-ФЗ «О проведении эксперимента по использованию электронных документов, связанных с работой» // Российская газета. 2020. 28 апреля. № 92 [Federal Law No. 122-FZ of 24 April 2020. On the Experiment on the Use of Electronic Work Related Documents, Rossiyskaya Gazeta, 28 April 2020, No. 92].

20 Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ // Собрание законодательства Российской Федерации. 2002. № 1 (ч. 1). Ст. 3 [Labour Code of the Russian Federation No. 197-FZ of 30 December 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1(3), Art. 3].

21 Федеральный закон от 22 ноября 2021 г. № 377-ФЗ «О внесении изменений в Трудовой кодекс Российской Федерации» // Российская газета. 2021. 24 ноября. № 266 [Federal Law No. 377-FZ of 22 November 2021. On Amendments to the Labour Code of the Russian Federation, Rossiyskaya Gazeta, 24 November 2021, No. 266].

22 Liu Dun & Geng Yuan, *The Model of the State Digital Platform on Labor Contracts in China,* 3(1) Digital L.J. 20–31 (2022).

duties with the help of digital technologies and in the field of digital space that should be the subject of attention for the legislator. Electronic personnel document management and digital signatures in labour relations are, (relatively speaking), the external face of communication between an employee and an employer, the so-called "technical aspect of the impact of information technology on labour relations,"[23] and the core of this relationship has remained outside the purview of legal regulation.

There is mounting evidence that employers are attempting to avoid or circumvent the fulfilment of the obligations established for them by labour legislation while employing strategies to attract employees to work for minimal wages.[24] There have been numerous studies devoted to various aspects of the transformation of labour relations in the context of digitalization. Employment is undergoing not only quantitative but also qualitative changes.[25] The approach to the workplace (work based on an Internet platform) is being modernized, leading to the realization by employees of the right to training, advanced training or retraining, which, in fact, now, in the conditions of globalization, becomes lifelong.[26] Additionally, the concept of 'disciplinary misconduct' is evolving[27] and the interaction between employees and employers are carried out in new ways. Employment contracts are now concluded for the most part as fixed-term agreements, wages are reduced and employer control takes on the features of surveillance. An interesting conclusion reached by the researchers is that there is a high probability that a significant disparity in the remuneration of the "head" and "ordinary" employees causes employees to commit labour violations.[28] According to legal scientists, patriarchy, slavery and racism have once again become markers of

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[23] *Костян И.А., Куренной А.М., Хныкин Г.В.* Трудовое право и цифровая экономика: сочетаются ли они? // Трудовое право в России и за рубежом. 2017. № 4. С. 10–12 [Irina A. Kostyan et al., *Labor Law and Digital Economy: Do They Match?*, 4 Lab. L. in Russ. & Abroad 10 (2017)]; *Лютов Н.Л.* Адаптация трудового права к развитию цифровых технологий: вызовы и перспективы // Актуальные проблемы российского права. 2019. № 6(103). С. 103 [Nikita L. Lyutov, *Adaptation of Labor Law to the Development of Digital Technologies: Challenges and Prospects*, 6(103) Current Probs. Russian L. 98, 103 (2019)].

[24] Fuxi Wang, *China's Employment Contract Law: Does it Deliver Employment Security?*, 30(2) Econ. & Lab. Rel. Rev. (2019) (Nov. 10, 2022), available at https://journals.sagepub.com/doi/10.1177/1035304619827758.

[25] Lyutov 2019, at 98–107.

[26] *Томашевский К.Л.* Цифровизация и ее влияние на рынок труда и трудовые отношения (теоретический и сравнительно-правовой аспекты) // Вестник Санкт-Петербургского университета. Право. 2020. № 11(2). С. 404, 405 [Kirill L. Tomashevski, *Digitalization and its Impact on the Labour Market and Employment Relations (Theoretical and Comparative Legal Aspects)*, 11(2) Vestnik of Saint Petersburg Univ. L. 404, 405 (2020)].

[27] *Забрамная Е.Ю.* Эволюция понятия «дисциплинарный проступок» в условиях цифровизации экономики // Вопросы трудового права. 2021. № 1. С. 18–25 [Elena Yu. Zabramnaya, *Evolution of the Concept of "Disciplinary Misconduct" in the Context of Digitalisation of the Economy,* 1 Emp. L. Issues 18 (2021)].

[28] Stephen Smulowitz & Juan Almandoz, *Predicting Employee Wrongdoing: The Complementary Effect of CEO Option Pay and the Pay Gap,* 162(3) Organizational Behav. & Hum. Decision Procs 123 (2021).

digital labour.[29] For example, Bingqing Xia, a scientist from China, described modern workers of the digital era as 'working hard' (workers face problems such as inequality and injustice, unequal pay for long working hours and violation of labour protection requirements by employers);[30] and Ping Sun, Julie Yujie Chen and Uma Rani in a joint article demonstrated the trend of deflection of digital platform workers, referring to the work of these workers as "sticky" ("Sticky Labour").[31] Time has shown that the notions of providing digital platform workers with greater flexibility, autonomy and independence in regulating labour issues are utopian; on the contrary, the work of such persons is highly demanding, stressful and hazardous.[32]

The violations committed by employees and employers in the digital environment are becoming more sophisticated and non-standard, challenging the classical understanding of labour law offenses. Let us give a vivid example. An employer used an employee's electronic digital signature to log into the employee's personal account and sign an agreement on the extension of the employment contract by mutual agreement of the parties. However, the employee was able to prove the illegality of this extension: the personal computer from which the agreement was signed was located on the employer's property and the employee objectively could not have performed the action of signing the specified agreement because the employee at the time was at an interview with another employer.[33]

A perfectly reasonable question arises: how to achieve the implementation of the above goals, objectives and interests? Even if we subordinate digital technologies to global human needs rather than profit, there will still remain many social, economic and political problems.[34]

It would appear that the legal transformation in the conditions of digitalization should be regulated by conventional labour law institutions, such as working hours and rest time, remuneration, and control over the behaviour of employees during the

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[29] Christian Fuchs, *Capitalism, Patriarchy, Slavery and Racism in the Age of Digital Capitalism and Digital Labour,* 44(4–5) Critical Soc. (2018) (Nov. 10, 2022), available at https://doi.org/10.1177/0896920517691108.

[30] Bingqing Xia, *Digital Labour in Chinese Internet Industries*, 12(2) Comm., Capitalism & Critique 668 (2014).

[31] Ping Sun et al., *From Flexible Labour to "Sticky Labour": A Tracking Study of Workers in the Food-Delivery Platform Economy of China*, Work, Emp. & Soc'y (2021) (Nov. 10, 2022), available at https://doi.org/10.1177/09500170211021570.

[32] Eleonore Kofman et al., *China and the Internationalisation of the Sociology of Contemporary Work and Employment,* Work, Emp. & Soc'y (2016) (Nov. 10, 2022), available at https://doi.org/10.1177/0950017021105942.

[33] Определение Седьмого кассационного суда общей юрисдикции от 11 января 2022 г. № 88-1761/2022 (88-2120/2021) [Decision of the Seventh Court of Cassation of General Jurisdiction No. 88-1761/2022 (88-2120/2021) of 11 January 2022].

[34] Michael M. Peters, *Beyond Technological Unemployment: The Future of Work*, 5 Educ. Phil. & Theory 485 (2020) (Nov. 10, 2022), available at https://www.tandfonline.com/doi/full/10.1080/00131857.2019.1608625?scroll=top&needAccess=true.

performance of their work duties. In the absence of legal regulation of these issues, these aspects of employee–employer interaction are modified, but spontaneously, without taking into account the interests of the employee, the weaker party in the legal relationship, which entails an infringement of the employee's rights and exposure to even greater pressure from the employer.

2. Digital Technologies and Classical Labour Relations

Modern information technology and communication systems enable people to work in ways that seemed impossible a few decades ago.

O.V. Chesalina, when considering such a form of employment as work based on an Internet platform (Crowdwork), poses a number of valid questions. "Do the new forms of work contain signs of independent work? And if so, should the norms of labour law and social security law be extended to them?"[35]

However, this new form of employment is also being transformed under unstable and rapidly developing conditions.[36] Scientists like to draw a distinction between solo-crowdworkers (single crowdworkers) and workers employed by "crowd farms."[37] The results of their research have shown that the work experiences and working conditions of solo crowdworkers differ significantly from the working conditions of employees of "crowd farms" (in terms of their motivation, methods of interaction, assigned tasks and the resolution of issues which they are working on).[38]

Definitely, such a form of employment (Crowdwork) has similarities with remote labour. At the same time, it assumes that the customer (employer) does not issue a task to a specific employee, as in remote work, but to an indefinite circle of people.[39]

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[35] *Чесалина О.В.* Работа на основе интернет-платформ (crowdwork и work on-demand via apps) как вызов трудовому праву и праву социального обеспечения // Трудовое право в России и за рубежом. 2017. № 1. С. 52–55 [Olga V. Chessalina, *Crowdwork and Work on Demand via Apps as a Challenge to Labor and Social Law*, 1 Lab. L. in Russ. & Abroad 52 (2017)].

[36] Michelle Olgun et al., *Croudwork & the Trade Regime: Opportunites and Challenges* (Nov. 10, 2022), available at https://www.researchgate.net/publication/349967459_Crowdwork_and_international_trade_Opportunities_and_challenges#pf25; Kumiko Kawashima, *Service Outsourcing and Labour Mobility in a Digital Age: Transnational Linkages Between Japan and Dalian, China*, 17(4) Global Networks (2017) (Nov. 10, 2022), available at https://www.researchgate.net/publication/312516805_Service_outsourcing_and_labour_mobility_in_a_digital_age_Transnational_linkages_between_Japan_and_Dalian_China.

[37] Yihong Wang et al., *The Changing Landscape of Crowdsourcing in China: From Individual Crowdworkers to Crowdfarms*, CSCW'19: Conference Companion Publication of the 2019 on Computer Supported Cooperative Work and Social Computing (2019) (Nov. 10, 2022), available at https://doi.org/10.1145/3311957.3359469.

[38] Yihong Wang et al., *Crowdsourcing in China: Exploring the Work Experiences of Solo Crowdworkers and Crowdfarm Workers*, CHI'20: Proceedings of the 2020 CHI Conference on Human Factors in Computing Systems (2020) (Nov. 10, 2022), available at https://doi.org/10.1145/3313831.3376473.

[39] Chessalina 2017, at 53.

As an example of such a form of employment, one can cite work done using the Uber application. The main feature of working on an Internet-based platform is the absence of any formal documentation of the relationship defining the rights and obligations of the parties, which ultimately can lead to employees being deprived of the ability to protect their labour rights.[40]

Working with digital platforms is one of the most important aspects of the broader trend towards delegating work to individual independent contractors without any obligations on the part of the customer caused by the burden of labour relations.[41]

The reason for this is the peculiarity of the business model of crowdwork platforms combined with the conceptual constraints imposed by traditional ideas about the status of an employee.[42]

Alternative ways of organizing work create disputes over the distinction between "employees" and "independent contractors," and occasionally, the employer (customer) will go to great lengths deliberately to distort the essence of the relationship with the employee.[43] The emergence of the digital economy tends to "accelerate the erosion of traditional ('classical') labour relations."[44] The employer becomes "invisible," appearing to "disappear" while retaining the ability to bring employees to labour and legal responsibility (disciplinary, material).[45]

The law should be aimed at eliminating the opportunities for leading firms to evade their duties and responsibilities to employees. Some rights should apply to independent contractors, for example, freedom from discrimination or the right to safe work under the supervision of a contractor.[46]

At the moment, such guarantees do not apply to them: for instance, Uber refers to its drivers as independent service providers, which does not require the company

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[40] *Чиканова Л.А., Серегина Л.В.* Правовая защита граждан от безработицы в условиях информационных технологических новаций в сфере труда и занятости // Право. Журнал Высшей школы экономики. 2018. № 3. С. 149–171 [Ludmila A. Chikanova & Larisa V. Seregina, *Legal Protection of Citizens against Unemployment in Conditions of Information Technological Innovations in the Field of Labour and Employment*, 3 L.J. Higher Sch. Econ. 151 (2018)].

[41] Cynthia Estlund, *What Should We Do after Work? Automation and Employment Law*, 2 Yale L.J. 254 (2018) (Nov. 10, 2022), available at https://ssrn.com/abstract=3007972.

[42] Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 Comp. Lab. L. & Pol. J. 619 (2015).

[43] Gay Davidov, *The Status of Uber Drivers: A Purposive Approach*, 6 Spanish Lab. L. & Emp. Rel. J. 8 (2017).

[44] Miriam Kullmann, *Flexibilization of Work: Leave it, Love it, Change it*, Festskrift till Ann Numhauser-Henning 405 (2017) (Nov. 10, 2022), available at https://www.researchgate.net/publication/316824962_Flexibilization_of_Work_Leave_It_Love_It_Change_It.

[45] The report of the International Labour Organization "The Future of Work We Want: A Global Dialogue" of 6–7 April 2017 (Nov. 10, 2022), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_570282.pdf.

[46] Estlund 2018, at 268–70.

to comply with standards regarding working hours and salaries, occupational safety requirements and prohibitions of discrimination. Furthermore, the company does not give its employees the opportunity to use federal guarantees of unionization. It is believed that independent service providers have stronger negotiating capabilities than employees, and hence they do not need such guarantees. This applies to numerous other independent service providers, such as doctors, lawyers and architects. But what if, for example, an Uber driver gets injured while transporting a passenger? Is this entirely the employee's responsibility or should the platform support the employee in some way? It turns out that such employees do not have the freedom of contract inherent in independent contractors, nor do they have the ability to use collective contractual regulation, which is the most important mechanism for protecting the rights of employees.[47]

Given that such employees enjoy a relatively high degree of freedom, it is frequently difficult to identify their relationship as an employment relationship and to provide them with protection by labour legislation.[48]

The answer to the question about the status of the categories of employees (service providers) under consideration should be sought on the basis of an analysis of the concept of labour relations.

Let us start from the understanding of the labour relationship that is given in the Recommendation of the International Labour Organization (ILO) dated 15 June 2006 No. 198 "On Labour Relations."[49] Subparagraph "a" of paragraph 13 of this act defines the key features of an employment relationship: work that is performed under the direction and in the interests of another person; integration into the organizational structure of the enterprise; personal performance of work; coordination of the schedule or period of work; and provision of tools, materials and mechanisms by the party who ordered the work.

In addition, paragraph 12 of the Recommendation states that

> Member States may provide for a clear definition of the conditions used to establish the existence of an employment relationship, for example, such as subordination or dependence.

The above gives reason to believe that an employee's affiliation with his or her employer is one of the main factors determining the status of an employee.

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47 Elizabeth J. Kennedy, *Employed by an Algorithm: Labor Rights in the On-Demand Economy*, 40 Seattle U.L. Rev. 1011 (2017) (Nov. 10, 2022), available at https://digitalcommons. law.seattleu.edu/cgi/viewcontent.cgi?article=2417&context=sulr.

48 Xie Zengyi, *The Changing Mode of Legal Regulation of Labor Relations in China*, 39(4) Soc. Sci. in China 96, 100 (2018).

49 Рекомендация № 198 Международной организации труда «О трудовом правоотношении» // СПС «КонсультантПлюс» [International Labour Organisation Recommendation No. 198 "On the Employment Relationship," SPS "ConsultantPlus"] (Nov. 10, 2022), available at http://www.consultant.ru/online/.

The relationship between the platform and its employees is long-lasting and strong: the platform fully controls the existence and nature of the relationship. In the case of Uber, for instance, the company inspects the drivers' vehicles as well as verifies their driving rights and insurance coverage. Uber is also in control of restricting its drivers' access to the platform.[50]

There is a hierarchy within Uber, and it is expressed through a rating system and the collection of other information regarding how well drivers perform their duties.[51]

Chinese researchers have highlighted the most important strategies developed by Uber to control the labour process of employees: a system of incentive payments; a system of customer ratings; and flexible work hours.[52]

Furthermore, studies conducted in China have shown that Uber uses a dynamic pricing method to build a system of remuneration for drivers, which significantly affects the quality of services provided, as well as the attraction of drivers during periods of peak demand.[53]

Drivers have complete freedom to choose their hours of work, yet there is an economic dependency. The company dictates the fare and the amount of money that is paid to the driver. The driver's ability to influence profits is practically nonexistent. The only way for the drivers to generate profits is to increase working hours, which is considered by some to be an indication of the absence of effective labour relations.[54]

We do not think so. The system of maintaining the reputation of the driver, which is based on the number of positive ratings, keeps the crowdworker under pressure to work as much as possible in order to achieve and maintain a positive rating.[55]

This is confirmed by judicial practice in the United States and the United Kingdom.

According to E. Kennedy, at least two courts in the United States have already recognized that Uber drivers are employees. And in the United Kingdom, the labour dispute court ruled in 2016 that they are employees and that the company's attempts to present the situation differently are pure fiction and in no way reflect the actual relationship between the parties (*Aslam v. Uber*).[56] In 2021, a final ruling was made on this case.[57]

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50 Prassl & Risak 2015.

51 Davidov 2017, at 12.

52 Qingjun Wu et al., *Labor Control in the Gig Economy: Evidence from Uber in China*, 61(4) J. Indus. Relation 574 (2019).

53 Feng Xiong, Si Xu & Dongzhu Zheng, *An Investigation of the Uber Driver Reward System in China – An Application of a Dynamic Pricing Model*, 33(1) Tech. Analysis & Strategic Mgmt. 46 (2011).

54 Davidov 2017, at 12–13.

55 Prassl & Risak 2015.

56 Kennedy 2017, at 994–1022.

57 «Удар в самое сердце»: Uber проиграл дело о правах водителей в Великобритании // Forbes.ru ["Punch to the Heart": Uber Loses Driver's Rights Case in the UK, Forbes.ru] (Nov. 10, 2022), available at https://www.forbes.ru/newsroom/biznes/421609-udar-v-samoe-serdce-uber-proigral-delo-o-pravah-voditeley-v-velikobritanii

The above gives reason to conclude that work based on Internet platforms possesses the majority of the features specified in Recommendation No. 198 of the International Labour Organization. At the same time, the peculiarity of the labour relations of employees with an employer of an Internet platform cannot be denied.

Of course, labour legislation must be flexible in order to adapt to the changing labour market. Thus, in China, labour legislation is practically not differentiated, as it does not take into account the peculiarities of the work performed by certain categories of workers. According to the current universal model, China's labour law ignores not only the differences between different types of employees, but it also does not recognize differences that exist between the different categories of employers.[58]

In this sense, Russia's labour law is more flexible. This is facilitated by the widespread use of the method of differentiation in the legal regulation of labour relations.

Similarly, in many countries, a category-based regulatory model is used, which takes into account the division of labour and employment into classical and special labour relations, as well as the different types of employers. Taking into account the complexity and diversity of labour relations, as well as the introduction of information technologies, it is urgently necessary to change the model of legal regulation of labour relations in order to provide appropriate institutional mechanisms and introduce rules that are different from traditional ones for new, flexible types of employment and their corresponding employees.[59]

In China, there is also a discussion at the political level about the status of employees of Internet platforms. Thus, local authorities establish rules for hiring drivers, including requirements for their qualifications. At the same time, the authorities are cautious about attempting to unambiguously qualify the relationship between drivers and Uber as one of employment.[60]

Based on scientific discussions and judicial practice, as well as taking into account the peculiarities of the digital economy, it has been proposed that criteria be formulated for determining the legal nature of Internet workers. So far, it has been proposed to include the duration of work and the type of service in such criteria. At the same time, the established approach to the status of employees of Internet platforms should reflect the need to ensure their rights, particularly those related to labour protection.[61]

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58 Zengyi 2018, at 99.

59 *Id.* at 100.

60 Chenguo Zhang, *China's New Regulatory Regime Tailored for the Sharing Economy: The Case of Uber under Chinese Local Government Regulation in Comparison to the EU, US, and the UK*, 35 Comp. L. & Sec. Rev. 470 (2019).

61 *Id.*

According to legal scientists in China, an important factor that determines the status of Uber drivers (as well as employees of other Internet platforms) is the primary or supplemental nature of the work. Those drivers for whom this work is their primary source of employment are more likely to comply with the requirements of the company and to adapt to the conditions that are already in place. This indicates their greater economic dependence on the platform, which is typical for labour relations.[62]

In Russia, the issue of the nature of relations arising between, for example, drivers and Internet platforms is resolved in favor of the civil nature of these relations (such as a contract for the provision of paid services[63] or a vehicle rental agreement[64]). We consider this approach to be not quite appropriate.

Due to certain circumstances that allow us to reach this conclusion, it appears that people who perform their work responsibilities on Internet platforms should be classified as employees, and not as "performers."

We mentioned earlier that China is considering the idea of creating a global Internet platform for employment contracts. The primary objective of the service known as "Work in Russia" is to facilitate the undocumented registration of "ordinary" labour relations. There was some discussion in China about the possibility of creating a platform for the employment of citizens on the basis of remote employment. The service could be designed not only to enable job searching but also to monitor compliance with the labour rights of employees of this online platform such as social guarantees, the terms of their employment contracts and trade union activities.[65] Considering China's state-led approach to solving such problems, the creation of an online platform for the employment of citizens is only a matter of time.

3. Electronic Monitoring of Employee Behaviour

Modern methods of monitoring employees pose an even greater threat to worker rights than traditional surveys, cameras or even a regular Global Positioning System (GPS) tracker. More modern devices, such as mobile phone apps, can be used for legitimate purposes, such as improving labour productivity or preventing theft. However, nothing prevents an employer from collecting information for other

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62 Wu et al. 2019, at 580–90.

63 Апелляционное определение Московского городского суда от 12 апреля 2018 г. № 33-15213/2018 // СПС «КонсультантПлюс» [Appeal decision of the Moscow City Court No. 33-15213/2018 of 12 April 2018, SPS "ConsultantPlus"] (Nov. 10, 2022), available at http://www.consultant.ru/online/.

64 Решение Калининского районного суда г. Челябинска от 6 октября 2016 г. № 2003761/2016 // СПС «КонсультантПлюс» [Decision of the Kalininsky District Court of Chelyabinsk No. 2003761/2016 of 6 October 2016, SPS "ConsultantPlus"] (Nov. 10, 2022), available at http://www.consultant.ru/online/].

65 Liu Dun & Geng Yuan, *The Model of the State Digital Platform on Labor Contracts in China,* 3(1) Digital L.J. 20–21 (2022).

purposes as well, such as to monitor biological reactions, listen in on personal telephone conversations or even determine employees' opinions towards trade union activities.[66] In 2018, Amazon patented the "hapticwristband," which monitors every movement of their employees.[67]

The peculiarity of today's control systems is that computers make such monitoring and observation of employees invisible.[68]

Moreover, today an employer, for example, may utilize technologies such as facial scanning, brain wave monitoring and emotion tracking to evaluate job applicants. It goes without saying that the collection and use of brain data, as well as any other data processing aimed at tracking and scanning emotions, feelings and mental states, should be prohibited in the workplace.[69]

The largest Chinese information technology companies have a surveillance system called the "Third Eye." This software gathers data from cameras located throughout the workplace as well as from the laptops of each employee in order to determine who is worthy of a promotion and who should be dismissed. The "Third Eye" allows employers to monitor their programmers' screens in real time, record their chats, their browser activity and every document edit. Some companies even install the system in restrooms. The program automatically detects "suspicious behaviour," such as accessing job search sites or video streaming platforms. Reports are generated weekly, summing up the time spent on "non-core" websites and applications. Moreover, the system does not differentiate whether an employee behaved "suspiciously" during working hours or during off-hours. Such control (surveillance) over an employee has its own legal consequences: an employee may be denied career advancements or a salary increase, and along with any corresponding "suspicious" behaviour of the employee, it may even serve as a reason for dismissal. All of this contributes to an increase in the number of cases of professional burnout and workplace suicide among workers in China.[70]

The practices described above may lead to unjustified interference with the privacy of employees and encroachment on the confidentiality of their personal lives by providing management with access to purely personal information. These

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66 Richard Bales & Katherine Stone, *The Invisible Web of Work: The Intertwining of AI, Electronic Surveillance, and Labor Law*, 41(1) Berkeley J. Emp. & Lab. L. 51 (2019).

67 *Id.* at 16–17.

68 *Морейра Т.К., Андраде Ф.* Электронный контроль в сфере трудовых отношений // Вестник Нижегородского университета им. Н.И. Лобачевского. 2015. № 3. С. 164–168 [Teresa C. Moreira & Francisco P. de Andrade, *Electronic Control in Labour Relations,* 3 Vestnik of Lobachevsky Univ. of Nizhni Novgorod 159, 164–68 (2015)].

69 Valerio de Stefano, *"Negotiating the Algorithm": Automation, Artificial Intelligence and Labour Protection*, 41(1) Comp. Lab. L. & Pol. J. (2019) (Nov. 10, 2022), available at https://ssrn.com/abstract=3178233.

70 *600,000 Chinese Die from Overworking Each Year*, China Daily, 11 December 2016 (Nov. 10, 2022), available at https://www.chinadaily.com.cn/china/2016-12/11/content_27635578.htm.

data not only do not contribute to improving the quality of work, but they can also cause stress in the employee, adverse reactions and, ultimately, lead to a decrease in the employee's efficiency and productivity.[71] This is especially true if such a system is installed without serious coordination with employees and explanations from the employer.[72]

According to accurate observations made by Richard A. Bales and Katherine V.W. Stone, the development of technologies for collecting and storing information about an employee will eventually lead to the fact that the accumulated data will be something like a "bank of information" about all employees, which all employers can use, for example, to evaluate a potential employee.[73] In our opinion, this is unacceptable.

Today, there is a disruption in the balance that exists in the workplace between one's professional and personal (or private) life. With a high degree of probability, it can be argued that digitalization is significantly transforming the workplace; however, states appear to be in no hurry to regulate these complex and crucial relationships at this time. For example, in Russia, the concept of robotization and algorithmization of the labour process has not been developed at the legislative level and the issue of the extent to which employers may exercise control over their employees using technological means has not been resolved.

And yet, in the majority of cases, the noted advantages of using digital monitoring and surveillance tools in labour relations do not negate concerns about violating the "boundaries of employee privacy."

> Such aggressive monitoring raises concerns about obtaining consent from an employee to collect personal information. The concept of employee consent, as defined in some national legislation, is not a valid basis for processing personal data due to an imbalance of forces in labour relations. Employees may agree to monitoring and supervision for fear of retaliation from the employer and possible job loss.[74]

The purpose of the social dialogue at the present stage is to agree on the same algorithm that affects the assessment of the labour relationship. For example, in 2017, UNI Global Union (formerly, Union Network International) released a series of

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71 de Stefano 2019.

72 David Halpern et al., *Management and Legal Issues Regarding Electronic Surveillance of Employees in the Workplace*, 80(2) J. Bus. Ethics 178 (2007).

73 Bales & Stone 2019, at 4.

74 Eurofound, *Employee Monitoring and Surveillance: The Challenges of Digitalisation*, Publications Office of the European Union, Luxembourg (2020) (Nov. 10, 2022), available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20008en.pdf.

advanced proposals on ethical artificial intelligence in the workplace.[75] A number of authors[76] report on several collective agreements that are already in force in various countries, where the use of technology is regulated not only in the supervision of workers but also in the management of their work in order to protect the dignity of people, ensure occupational safety and the safety of workers.[77]

Thus, the legislation of many countries is moving in the direction of restricting the rights of employers to exercise electronic control over the behaviour of employees.

The European Court of Human Rights, in its landmark ruling of 5 September 2017, the case of *Barbulescu v. Romania* (Complaint No. 61496/08), essentially recognized the fact that employers do not have the right to use digital technologies in any way they please, since these technologies are intrusive in the sense that they affect employees' rights to respect for "personal life" (paragraphs 61, 73). The employer, in exercising control over the behaviour of employees, cannot assess their actions adequately since there is a strong temptation to learn as much as possible about an employee and then evaluate that employee not only in their capacity as a worker but also as a member of the family, society and the state.

The Oklahoma Statutes, specifically paragraph 40, titled "Labor," is of significance in this regard.[78] Article 173.2 of this act establishes rules on prohibited actions in relation to personal accounts on social networks.

In Russia, violations that occur in connection with the implementation of electronic control by employers are often associated with violations of the requirements of Federal Law No. 152-FZ of 27 July 2006 "On Personal Data."[79] The supervisory authorities indicate that it is necessary to take into account the purpose pursued by the operator when carrying out actions that are related to the processing of personal data. If they are used by the operator to establish the identity of the subject of personal data, then this processing must be carried out with the consent of the employee. However, if the processing of personal data is carried out for purposes other than "identification," then the actions cannot be considered processing of

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[75] Global Union Sets New Rules for the Next Frontier of Work–Ethical AI and Employee Data Protection (UNI Global Union, 11 December 2017) (Nov. 10, 2022), available at http://uniglobalunion.org/news/global-union-sets-new-rulesnext-frontier-work-ethical-ai-and-employee-data-protection.

[76] Phoebe V. Moore et al., *Humans and Machines at Work: Monitoring, Surveillance and Automation in Contemporary Capitalism*, in Phoebe V. Moore et al. (eds.), Humans and Machines at Work. Dynamics of Virtual Work (Nov. 10, 2022), available at https://doi.org/10.1007/978-3-319-58232-0_1.

[77] de Stefano 2019.

[78] Oklahoma Statutes Title 40. Labor, secs. 40–173.2, Prohibited actions regarding personal social media accounts – Exemptions – Civil actions (2019) (Nov. 10, 2022), available at https://law.justia.com/codes/oklahoma/2019/title-40/section-40-173-2/.

[79] Федеральный закон от 27 июля 2006 г. № 152-ФЗ «О персональных данных» // Российская газета. 2006. 29 июля. № 165 [Federal Law No. 152-FZ of 27 July 2006. On Personal Data, Rossiyskaya Gazeta, 29 July 2006, No. 165].

biometric personal data and can be carried out without the consent of the subject since it is necessary for the fulfilment of the contract.

An analysis of Russian legislation allows us to come to the following conclusion: the legality of the procedure for establishing video surveillance of employees at the workplace without obtaining consent from employees to process personal data is justified due to the employer's compliance with a number of organizational procedures. Such procedures include the following:

1) adoption of a relevant local regulatory act by the employer;

2) definition of the purposes for which video surveillance is being used;

3) familiarizing employees with the local regulatory act and notifying them of the introduction and implementation of video surveillance of them. Video surveillance must be conducted openly;

4) placement of information signs in the areas of visibility of the cameras on the premises where video cameras are installed;;

5) appointment of a specially authorized person who will be granted access to personal data of employees.

In Russia, the processing of such personal data, which allows the identification of an employee as a person, is carried out by the employer without the consent of the employee due to an incorrect formulation of the term "biometric personal data" as well as an incorrect interpretation of this concept by Roskomnadzor (Russia's Federal Service for Supervision of Communications, Information Technology and Mass Media).[80] It turns out that determining the volume of the specified data is not necessary in order to recognize personal data as biometric; rather, it is necessary to establish and comply with the purpose of their processing. This approach appears to be flawed on a fundamental level.

Furthermore, it appears that the main, basic feature of biometric personal data is that they characterize the physiological and biological characteristics of a person, regardless of the purpose for which the employer processes them. In addition, with the aid of audio and video recordings, the employer can establish the identity of an employee who violates workplace discipline. Accordingly, such a feature of biometric personal data as 'identification of the subject of personal data' may manifest itself indirectly when the employer exercises control over the employee's performance of work duties in the form of video surveillance.

All of this allows us to make the following assertions:

1. Personal data that became known to the employer as part of the implementation of video surveillance of the employee's behaviour while at work or at the workplace should be attributed to biometric personal data.

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[80] Разъяснения Роскомнадзора «Вопросы, касающиеся обработки персональных данных работников, соискателей на замещение вакантных должностей, а также лиц, находящихся в кадровом резерве» // СПС «КонсультантПлюс» [Clarifications by Roskomnadzor "Issues Related to the Processing of Personal Data of Employees, Applicants for Vacant Positions, as Well as Those in the Personnel Reserve," SPS "ConsultantPlus"] (Nov. 10, 2022), available at http://www.consultant.ru/online/.

2. The processing of these biometric personal data must be carried out with the consent of the employee whose personal data is being processed, except in the instances that are established by federal laws.[81]

3. An employer has the legal right to process the biometric personal data of employees in order to monitor their attendance and access to the employer's premises, as well as to protect other employees, clients and the employer's property from unlawful encroachments. The use of digital technologies for the sole purpose of monitoring the activities of employees is unacceptable and should not violate their privacy.

It appears that in order to maintain a balance between the interests of employees and employers, as well as to increase the confidence of the parties to the employment relationship, it is the legislator who should set the goals of electronic monitoring of employees at the level of federal law.

The same problem is faced by lawmakers in China, where workers are increasingly raising the issue of privacy violations when they are subjected to real-time video surveillance during working hours while working remotely. Courts in China are increasingly embracing a modern approach to this issue, which recognizes that it is unlawful for employers to dismiss employees for refusing to turn on their computer screens and webcams and leave them on during all working hours.[82] In other words, there is sufficient ground for legislative measures to restrict the use of electronic monitoring of employee behaviour.

Conclusion

Thus, this study showed that similar issues exist in Russia and China in terms of legislative support for digitalization of labour relations. The legal regulation of the use of digital technologies in the field of labour as it exists today is not designed for the long term and resembles "patching holes." A number of issues in urgent need of legal regulation remain outside the legal field (for example, robotization and algorithmization in the field of labour; the protection of personal data of job applicants and the problem of unemployment in the application of artificial intelligence in the labour process). Such a "silence" can affect the stabilization of labour relations and increase discrimination in the field of labour.

Often, the legislator, who sometimes acts as an employer and sometimes as a regulator of legal relations, takes into account the requirements of only one side of the employment relationship: the employer or the interests of the state.

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[81] Elena Ofman & Mikhail Sagandykov, *Electronic Monitoring for Employees: Employer Rights in the XXI Century*, 23(1) J. Legal, Ethical & Reg. Issues (2020) (Nov. 10, 2022), available at https://www.abacademies.org/articles/electronic-monitoring-for-employees-employer-rights-in-the-xxi-century-9605.html.

[82] **国外一公司**远程监控居家员工被判赔偿50**多万元** [*A foreign company was awarded more than $500,000 in damages for remotely monitoring its home-based employees*] (Nov. 10, 2022), available at https://www.gamersky.com/news/202210/1525805.shtml.

A number of regulations, primarily at the level of policy documents, both in Russia and in China indicate the need for a clearer definition of the legal status of employees of Internet platforms.

We believe that persons performing work on Internet platforms should be classified as employees, and not as performers under a civil contract. Judging by the decisions of the authorities and judicial bodies reviewed, China is closer to this conclusion than Russia.

It appears that today there is an urgent need for the federal authorities of Russia to adopt a "strategy for the transformation of labour relations in the application of digital (information) technologies," paying special attention to establishing a balance between the rights and interests of employees, employers and the state and the need to develop a concept of robotization and algorithmization of the labour process.

It is necessary to use a model of differentiation for the legal regulation of labour based on the allocation of a special category of employees and employers, namely online platforms. In Russia, differentiation of labour legislation is one of the main trends, but it has not yet been applied to employees of Internet platforms. In China, in general, the differentiation of legal regulation of labour relations is not developed. Significant legislative efforts should be made in both countries in this area.

When performing work on Internet platforms, employees enjoy greater flexibility in terms of working hours and rest time. However, employees of Internet platforms are subject to new types of risks, different from the risks faced by "traditional" workers. One of the main problematic issues is the issue of wages and the establishment of a minimum amount in the first place. In connection with the above, it would appear that minimum wages and minimum permitted working hours (as opposed to only the maximum, as currently is the case in the labour legislation of Russia) should be established at the legal level of the law.

When developing these and other documents, as well as adjusting the current regulatory framework, the Russian legislator should take into account the experience of international and foreign regulation of labour relations in the field of digitalization of labour relations, for example, to set limits on the intrusion of employers into the privacy of employees when monitoring their behaviour. It seems necessary to adjust both the concept and conditions of how the biometric personal data of employees is processed.

The legislation of Russia, as well as China, is far from establishing legal limits for the employer to carry out electronic monitoring of employee behaviour despite the fact that in both countries this control is only increasing and, at times, taking unacceptable forms.

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